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No. 97-641

In the Supreme Court of the United States

OCTOBER TERM, 1997

BRENDA PREMO, DIRECTOR, CALIFORNIA DEPARTMENT OF REHABILITATION, PETITIONER

v.

JEANA MARTIN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court abused its discretion in refusing to consider petitioner's claim that the Randolph-Sheppard Act, 20 U.S.C. 107 *et seq.*, does not require state licensing agencies to pursue a vendor's grievances against a federal agency.

2. Whether the Randolph-Sheppard Act authorizes an arbitration panel to award compensatory damages to a vendor as a remedy for a state licensing agency's failure to pursue a vendor's grievances against a federal agency.

3. Whether a State, by participating as a state licensing agency under the Randolph-Sheppard Act, waives its immunity against federal court enforcement of an arbitration award for monetary damages.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A14) is reported at 119 F.3d 764. The opinion of the district court (Pet. App. B1-B22) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 11, 1997. The petition for a writ of certiorari was filed on October 7, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Randolph-Sheppard Act, 20 U.S.C. 107 *et seq.*, establishes a cooperative federal-state program

to provide blind persons with opportunities to operate vending facilities on federal and other properties. 20 U.S.C. 107(a) and (b). The Secretary of Education has overall responsibility to administer the Act, as well as authority to promulgate regulations to carry out the Act's purposes. 20 U.S.C. 107(b), 107a(a); see 34 C.F.R. Pt. 395.

As part of his responsibilities, the Secretary designates state licensing agencies (SLAs) to implement the program. 20 U.S.C. 107a(a)(5). A State's participation in the program is voluntary, and a state agency wishing to be designated as an SLA must apply to the Secretary and agree to specified conditions. 20 U.S.C. 107b. For example, the Act requires SLAs to negotiate with federal agencies for the operation of vending facilities on federal sites, 20 U.S.C. 107a(c), and to equip the facilities, 20 U.S.C. 107b(2). The Act also imposes obligations on federal agencies to make vending facilities available to blind persons. 20 U.S.C. 107a.

A blind vendor who is dissatisfied with the action of an SLA must first seek relief from the SLA. 20 U.S.C. 107b(6), 107d-1(a). If the vendor is dissatisfied with the SLA's resolution of the matter, the vendor may "file a complaint with the Secretary who shall convene a panel to arbitrate the dispute." 20 U.S.C. 107d-1(a). Whenever an SLA determines that a federal agency is failing to comply with the Act, it may file a complaint with the Secretary, who will then convene an arbitration panel to address the dispute. 20 U.S.C. 107d-1(b), 107d-2(b)(2).

Arbitration panels must give notice and conduct a hearing in accordance with the provisions of the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.* See 20 U.S.C. 107d-2(a). The ruling of such a

panel constitutes "final agency action" for purposes of judicial review under the APA, even though the Secretary has no authority to review or modify the arbitral decision. *Ibid.* Apart from such judicial review, the arbitral decision is "final and binding on the parties." 20 U.S.C. 107d-1(a).

2. The California Department of Rehabilitation (Department) is the SLA for the State of California. In 1985, the Department issued a license to respondent Jeana Martin, a blind person, to operate a snack bar and lunch room at the United States Post Office in Santa Ana, California. Pet. App. A3. In 1992, the Department revoked respondent's license based on her failure to satisfy financial obligations. *Ibid.*

Respondent filed a complaint with the Department of Rehabilitation, alleging that the Department had failed to take adequate steps to ensure that the Postal Service complied with the Act. Pet. App. A3. Respondent also filed a complaint alleging that the Department had wrongfully terminated her license. *Id.* at A3-A4. The Department denied relief. *Id.* at A4. Respondent subsequently invoked her right to arbitration. *Ibid.*

In 1994, the arbitration panel ruled in favor of respondent. Pet. App. C1-C27. The panel concluded that the State had violated the Randolph-Sheppard Act by failing to renovate respondent's vending facilities, by failing to insist on assignment by the Postal Service to respondent of income from competing vending machines, and by failing to take steps to prevent the Postal Service from renewing a contract with another vendor. *Id.* at C24. The panel also concluded that the State's violations had caused respondent's financial difficulties and that the State had therefore wrongfully terminated respondent's license. *Ibid.* In

a later remedial ruling, *id.* at D1-D8, the panel concluded that it had authority to issue an award that would compensate respondent for all losses traceable to the State's violations of the Act. *Id.* at D2. The panel ordered a monetary award, including damages and attorney's fees, totaling approximately $450,000. *Id.* at D6. The panel also ordered the State to reinstate respondent's license, to place her at a vending facility comparable to the one she had previously operated, and to compensate her at a specified rate until that was done. *Ibid.*

3. Petitioner Premo, the Director of the Department of Rehabilitation, then filed suit in the United States District Court for the Central District of California against the Department of Education, the Secretary of Education, and respondent. Pet. App. A4-A5. Petitioner alleged that the arbitration panel's award of compensatory damages and attorney's fees violated the Eleventh Amendment to the Constitution. *Id.* at A5. Petitioner further alleged that certain procedural aspects of the arbitration violated the Due Process Clause. *Ibid.* Respondent asserted a counterclaim against petitioner, seeking an order enforcing the arbitral award. *Ibid.* Although not included in her complaint, petitioner argued in a dispositive motion that the Randolph-Sheppard Act does not require an SLA to pursue a vendor's grievance against a federal agency. *Id.* at B19.

The district court granted summary judgment in favor of all respondents. Pet. App. B1-B21. The court held that, by voluntarily participating in the Randolph-Sheppard program, the State had waived its sovereign immunity against a damage award by an arbitration panel as well as its immunity from federal court enforcement of such an award. *Id.* at B12-B14.

The court also rejected petitioner's Due Process claims. *Id.* at B15-B19. The court held that a State may not assert a due process claim, and that, in any event, petitioner's claims of procedural unfairness were without merit. *Ibid.* The court refused to address petitioner's argument that the Act does not require an SLA to pursue a vendor's grievance against a federal agency. *Id.* at B19-B20. The court concluded that, because petitioner raised that issue for the first time in a motion and did not make that claim in her complaint, that issue was not properly before the court. *Id.* at B20.

Following the district court's entry of final judgment, petitioner filed a motion seeking leave to file an amended complaint in order to assert a claim that the Act does not require an SLA to pursue a grievance against a federal agency. Pet. App. A5; Pet. 7. The district court denied the motion. *Ibid.*

4. The court of appeals affirmed. Pet. App. A1-A14. The court held that the Eleventh Amendment does not limit the authority of an arbitration panel to award compensatory relief. *Id.* at A8. The court explained that, "[i]n referring to the 'Judicial power of the United States,' the Amendment on its face limits only the authority of Article III courts," and "does not purport to affect proceedings in tribunals established by statute." *Ibid.* The court also concluded that the arbitration panel had statutory authority to award compensatory damages to respondent. *Id.* at A9-A10. The court noted that the parties, including petitioner, did not dispute that point, and that the courts of appeals had generally agreed that the text of the Act permits arbitration panels to award compensatory relief since "the prevailing conception at the time the Act was passed was that arbitral resolution

of disputes involved awards of back pay and other forms of compensatory relief." *Id.* at A9.

The court of appeals next held that the Eleventh Amendment did not preclude federal court enforcement of the arbitration panel's award of compensatory relief. Pet. App. A11-A12. The court recognized that under this Court's decisions, a waiver of Eleventh Amendment immunity will be found "only where stated by the most express language or by such overwhelming implication from the text as [will] leave no room for any other reasonable construction." *Id.* at A10 (quoting *Port Authority Trans-Hudson Corp.* v. *Feeney*, 495 U.S. 299, 305 (1990)). Here, the court concluded, the "overwhelming implication of the statute is that by agreeing to participate in the Randolph-Sheppard program, states have waived their sovereign immunity to enforcement of such awards in federal court." *Id.* at A13.

The court of appeals also rejected petitioner's procedural objections to the arbitration. Pet. App. A12-A13. Finally, the court of appeals ruled that the district court had acted within its discretion in declining "to allow the State to expand its case" by means of a post-judgment amendment to the complaint. *Id.* at A14. The court noted that "the State had ample opportunity to file an amended complaint with new allegations before the court issued its final judgment," and that "the likelihood that amendment will cause undue delay in the proceedings is a legitimate rationale for denying a motion to amend," particularly "[a]fter a judgment has been issued." *Ibid.*

ARGUMENT

1. a. Petitioner contends (Pet. 12-13) that the Court should grant review to resolve the question whether the Randolph-Sheppard Act requires an SLA to pursue a vendor's grievances against a federal agency. That question is not properly presented here.

As the district court found, petitioner did not include in her complaint any allegation that the arbitration panel had acted contrary to law in holding that an SLA has a duty under the Randolph-Sheppard Act to pursue vendor grievances against a federal agency. Pet. App. B19-B20. Instead, without seeking leave to amend her complaint, petitioner raised that question for the first time in one of her dispositive motions. *Ibid.* As a consequence, the district court concluded that the issue was not properly presented and did not consider it. *Id.* at B20. The district court subsequently denied petitioner's post-judgment motion to amend her complaint to raise that issue. *Id.* at A5; Pet. 7. Although petitioner sought to raise that issue on appeal, the court of appeals similarly refused to consider it. *Id.* at A14. Noting that petitioner had ample opportunity to amend her complaint prior to the entry of judgment, the court of appeals held that the district court did not abuse its discretion in refusing to entertain petitioner's belated effort to raise the issue. *Ibid.* Petitioner does not challenge that procedural ruling here. See Pet. i, 12-13.

Because petitioner failed to raise in a timely manner the question whether an SLA has a duty to pursue vendor grievances against a federal agency, and because the lower courts did not consider the issue, that question is not properly presented here. For the same reason, petitioner errs in contending

that there is a conflict between the decision below and the holding in *Georgia Department of Human Resources* v. *Nash*, 915 F.2d 1482, 1487 (11th Cir. 1990), that a vendor has "no substantive right to challenge a state's failure to file a complaint against a federal entity." As a result of petitioner's procedural default, the court below simply did not address that issue.

b. Petitioner's failure to raise the question of liability in a timely manner not only affects the propriety of granting review on that question; it also affects the propriety of granting review on the two other questions petitioner seeks to present concerning the authority of an arbitration panel to award compensatory relief for the violation found by the arbitration panel and the authority of a federal court to enforce such an award. Citing the nearly $450,000 damage award in this case, the amici brief filed by certain States argues (at 5) that the decision below warrants review because it opens the door to similar awards against other States. It is entirely possible, however, that the decision below is an aberration that is attributable to petitioner's failure to raise her liability argument in a timely manner. The only court of appeals to have considered the issue has ruled that a State is not liable in circumstances like those presented here. See *Nash*, *supra*. Had petitioner properly presented the liability argument she attempts to raise belatedly, the result below could well have been different, and it is speculative, at present, whether the decision below will lead to comparable judgments in future cases.

The very real possibility that there may be no violation in circumstances like those presented here also makes the remedial questions raised by peti-

tioner abstract and hypothetical.[1] In effect, the Court would be required to decide whether Congress intended to condition the State's participation in the Randolph-Sheppard program on the State's consent to compensatory relief and federal court enforcement of such relief that is designed to remedy conduct that quite possibly does not violate the Randolph-Sheppard Act. Such abstract and hypothetical questions are not suitable for this Court's review.

2. Even apart from the considerations discussed above, the question whether arbitration panels have authority to grant compensatory damages does not warrant review.

a. Although petitioner now contends (Pet. 13-17) that arbitration panels do not have authority to award compensatory damages, the court of appeals understood petitioner as "not disput[ing] that, as a matter of statutory construction, the Randolph-Sheppard Act gives arbitration panels the authority to award compensatory relief." Pet. App. A9. That understanding appears to have played a role in the court of appeals' disposition of that issue. *Id.* at A9-A10. It is therefore unclear whether the decision below will be regarded in the Ninth Circuit as binding precedent on the question whether an arbitration panel has statutory authority to award compensatory relief.

b. In addition, while petitioner contends that the Randolph-Sheppard Act does not give arbitration panels authority to award monetary damages under any circumstances (Pet. 11), no court of appeals has

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[1] The federal respondents took no position in the courts below on whether the Act imposes an enforceable duty on an SLA to present claims to a federal agency on behalf of a blind vendor.

adopted that view. The Third and the Sixth Circuits have both held that arbitration panels have authority to award monetary damages. *Delaware Dep't of Health & Social Servs.* v. *United States Dep't of Educ.*, 772 F.2d 1123, 1137 (3d Cir. 1985); *Tennessee Dep't of Human Servs.* v. *United States Dep't of Educ.*, 979 F.2d 1162, 1165 (6th Cir. 1992). Because the Act gives a vendor the right to submit any dispute with an SLA to arbitration, and arbitrators in other contexts have typically had authority to award damages, those courts have concluded that Congress intended to condition a State's participation in the program on the State's consent to the possibility that an arbitration panel would award damages against the SLA for violations of the Act. *Ibid.* The Eighth Circuit is the only other court of appeals to have addressed the issue squarely, and it held that, while arbitration panels could not award compensatory relief in the form of "retroactive damages," such panels could award compensatory relief in the form of "prospective damages." *McNabb* v. *United States Dep't of Educ.*, 862 F.2d 681, 683 (8th Cir. 1988), cert. denied, 493 U.S. 811 (1989).

c. Petitioner contends (Pet. 14) that the Eleventh Circuit's ruling in *Nash* conflicts with the Third Circuit's decision in *Delaware* and the Sixth Circuit's decision in *Tennessee*. But the decision in *Nash* turned on the court's holding that SLAs do not have an obligation under the Act to file complaints against federal agencies. 915 F.2d at 1488-1495. That court did not suggest that there was any general limitation on the power of arbitrators to redress violations through awards of compensatory relief. To the contrary, the *Nash* court noted with apparent approval the Third Circuit's holding in *Delaware* that arbitra-

tion panels have authority to award compensatory damages against SLAs. *Id.* at 1492. As petitioner notes (Pet. 13), the Eighth Circuit's decision in *McNabb* conflicts with *Delaware* and *Tennessee* to the extent that *McNabb* holds that an arbitration panel may not award retroactive compensatory relief. But the *McNabb* decision was issued ten years ago, before the Sixth Circuit's decision in *Tennessee* and the Ninth Circuit's decision in this case. Moreover, that decision was highly fractured, with one judge concluding that compensatory relief is generally available, 862 F.2d at 684-685 (Lay, J., concurring and dissenting), one concluding that such relief is never available, *id.* at 685-687 (Fagg, J., concurring and dissenting), and one striking the middle ground that retroactive compensatory relief is not available, but that prospective compensatory relief, fees, and costs are available, *id.* at 687-688 (Doty, J., concurring and dissenting). In light of more recent developments and the fragmented nature of the decision in *McNabb*, the Eighth Circuit may well be prepared to revisit the issue. The decision in *McNabb* therefore does not provide a sufficient justification for granting review in this case. And that is particularly true in light of the special features of this case that have already been discussed.[2]

3. Petitioner's contention (Pet. 8-12) that a federal court does not have authority to enforce an arbitra-

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[2] As the court of appeals held (Pet. App. A8), the question whether an arbitration panel may award compensatory relief does not itself raise an Eleventh Amendment question since that Amendment, by its terms, affects only the "Judicial power of the United States." Petitioner does not appear to contend otherwise. Compare Pet. 8-12 with Pet. 13-17.

tion panel's award of compensatory relief also does not warrant review. The decision below that federal courts have such authority is at odds with the position we took below, and it conflicts with the Sixth Circuit's decision in *Tennessee*. As previously discussed, however, the uncertainty concerning whether there was a violation in this case at all makes this an unsuitable vehicle for resolving remedial questions. Moreover, several other considerations suggest that review is not warranted.

a. First, there is no contention in this case, and the court below did not hold, that Congress would have authority to subject an unconsenting State to a federal court action to enforce an arbitration panel award issued pursuant to the Randolph-Sheppard Act. Rather, the court below held, and petitioner does not dispute, that Congress has authority under the Constitution to condition a State's participation in the Randolph-Sheppard program on the State's willingness to consent to federal court enforcement of arbitration awards that include monetary relief. The question presented is therefore essentially one of statutory construction—whether Congress clearly intended to condition a State's participation in the Randolph-Sheppard program on such consent. See *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 247 (1985).

b. Second, the court of appeals applied the correct legal standard for resolving that issue. The court noted that it is proper to conclude that Congress has conditioned State participation in a program on its consent to suit only "where stated by the most express language or by such overwhelming implication from the text as [will] leave no room for any other reasonable construction." Pet. App. A10 (quot-

ing *Port Authority Trans-Hudson Corp.* v. *Feeney*, 495 U.S. 299, 305 (1990)). The disagreement between the parties centers on the application of that standard to the unique statutory text and structure of the Randolph-Sheppard Act, including its unusual provision for arbitration of disputes with blind vendors, to which the State, through its SLA, unquestionably consented by agreeing to participate in the program.

c. Third, Congress clearly did intend to condition a State's participation in the Randolph-Sheppard program on the State's willingness to submit the question of what relief is appropriate for violations of the Act to an arbitration panel, subject only to review by a federal court. The Act provides that the State shall "agree to submit the grievances of any blind licensee not otherwise resolved * * * to arbitration as provided in section 107d-1." 20 U.S.C. 107b(6). The referenced provision, in turn, states that, except as otherwise provided in the Act, such arbitration "shall be final and binding on the parties." 20 U.S.C. 107d-1(a). The Act provides for review of an arbitration decision through a single mechanism: a suit in federal court pursuant to the judicial review provisions of the APA, 5 U.S.C. 701 *et seq.* See 20 U.S.C. 107d-2(a). Thus, when as here, an arbitration panel awards monetary damages, and the State seeks review of that decision in federal court, the State has consented to a federal court decision concerning whether the arbitration panel had authority to award monetary relief. The question presented here is therefore the extremely narrow one of whether, in such a case, the State's consent encompasses a counterclaim by the vendor for the enforcement of that very same award.

d. Fourth, at least as a general matter, it is unlikely that there will be any significant practical dif-

ference between a federal court order "affirming" an arbitration panel's award and a federal court order "enforcing" such an award, since the Act makes the arbitration award "binding" on the State even in the absence of a judicial order of enforcement. In particular, we have no reason to believe that a State would view its obligation to comply with a binding arbitration award differently depending on whether the federal court affirmed the arbitrator's award or instead both affirmed the award and ordered its enforcement. We must assume that the State would feel obliged to pay the award in either event, and indeed petitioner does not assert otherwise in this case.

e. Finally, there has been a paucity of litigation involving Randolph-Sheppard arbitration procedures, and there is no reason to expect that the volume of such litigation will increase. The Third Circuit rendered its decision in *Delaware* more than a decade ago, and litigation has been sporadic ever since.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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